HONOURABLE SRI JUSTICE J.CHELAMESWAR
And
HONOURABLE SRI JUSTICE D.APPARAO

FRIDAY, NINETH DAY OF JUNE TWO THOUSAND SIX

WRIT PETITION No.11022 of 2006

Between:

T.Balashankar Reddy

.. Petitioner

Vs.

1. The Income Tax Officer, Nellore and others

.. Respondents

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ORDER (Per Hon'ble Sri DAR, J)**:**

Heard the learned counsel for the appellant and the learned Standing Counsel for Income Tax. With their consent the writ petition is being disposed of at the stage of admission.

2. The writ petitioner did business of wholesale distribution of Indian made Foreign Liquor (IMFL) at Nellore. He filed income tax returns for the assessment year 1988-89 on 28.02.1990. The Assessing Officer *inter alia* made two additions to returned income on the ground that he did not prove them. Against the order of assessment, dated 26.03.1991, he preferred appeal before the CIT-A, Vijayawada. The matter was remanded once again. However, the assessment was made by order, dated 30.03.1994, confirming earlier order. Aggrieved by the said assessment order, an appeal was preferred. However, the same was confirmed by order, dated 26.12.1995. Against the said order, a further appeal was preferred before the Income Tax Appellate Tribunal. However, the Tribunal without hearing the matter dismissed the appeal 'in default for non-prosecution' by order, dated 29.09.2000. Since the order was not served on him, the petitioner filed M.P. 76/Hyd/05 to recall the dismissal order, dated 29.09.2000 with a request to the appellate Tribunal to recall the ex parte order sunder Rule 24 (proviso) of Income Tax Appellate Tribunal Rules, 1963 and dispose of the matter after hearing. The said application was also dismissed by order, dated 17.02.2006 holding that the application was barred by time and that the appellate could not adduce sufficient reason for his non appearance. As against the said order, the petitioner filed this writ to quash the said order on

the ground that it was contrary to Rule 24 (proviso) of the Income Tax Appellate Tribunal (ITAT) Rules, 1963 (for brevity 'Rules,1963').

3. It is not in dispute that the petitioner could not appear before the appellate Tribunal, when the appeal was preferred by him. The notice of intimation though was sent to his not last known address it was returned with a postal endorsement that it was 'insufficient address'. The appellate Tribunal dismissed the appeal in default for non prosecution holding that no useful purpose would be served to send notice once again, and that the appeal was very old and assessee was not interested to pursue the matter. Coming to know of it, the writ petitioner filed miscellaneous petition requesting for an opportunity to canvass the matter as he had no notice of the appeal. The said application was dismissed on the ground that it was belated. It was observed that justice could be done for those persons who are vigilant and not for indolent.

4. Ex facie the impugned order cannot sustain in the teeth of Rule 24 of Appellate Tribunal Rules, 1963. For benefit we reproduce the same.

> "Where on the day fixed for hearing or on any other date to which the hearing may be adjourned, the appellate does not appear in person or through an authorized representative when the appeal is called on for hearing. The Tribunal may dispose of the appeal on merits after hearing the respondent.
>
> Provided that where an appeal has been disposed of as provided above and the appellate appears afterwards and satisfies the Tribunal that there was sufficient cause for his non appearance, when the appeal was called on for hearing, the Tribunal shall make an order setting aside the ex parte order and restoring the appeal."

5. Necessarily, the appellate Tribunal has to dispose it of the

appeal on merits. It cannot dismiss it for default. Even in an extreme case, where the appellate Tribunal could dispose of the appeal on merits after hearing the respondent, even then when appellant on later point of time approaches the appellate Tribunal and show sufficient cause of his earlier non-appearance, the Tribunal shall restore the appeal and has to dispose it of on merits.

6. In the instant case the assessee by way of miscellaneous petition approached the tribunal and pleaded that he was not served with any notice of hearing. It is not the case of appellate Tribunal even, that the earlier notice of hearing was served. It could have allowed protanto in the view of the fact that earlier the appeal was dismissed for default – and not on merits – contrary to Rule 22 of the Rules.

7. When admittedly no notice was served on the petitioner, and when the appellate Tribunal could not dispose of the appeal in default, the impugned order can no longer sustain. It could have heard the respondent and disposed of appeal on merits. Despite the fact that the petitioner has come with an application, instead of hearing the appeal, it was also dismissed on the ground that it was barred by limitation, though no period of limitation is prescribed either under the Act or under the Rules. A dismissal of an appeal before the appellate Tribunal for default does not arise. Such a course is not contemplated either under the Act or Rules framed thereunder. The order is liable to be set aside.

8. In the result, the writ petition is allowed, the impugned order, dated 17-02-2006, is quashed. The appellate Tribunal is directed to restore the appeal to its file and dispose of the matter on merits after hearing both parties within a period of one month, from the date of receipt of a copy of this order. No costs.

(J.CHELAMESWAR, J)

(D.APPARAO, J)

June 9, 2006.

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